Federal Court of Appeal | Cour d'appel fédérale

~~**TOP SECRET**~~

Date: 20210806

Docket: A-243-20

Citation: 2021 FCA 165

CORAM: **DE MONTIGNY J.A.**
LASKIN J.A.
MACTAVISH J.A.

IN THE MATTER OF an application by [redacted] for warrants pursuant to sections 16 and 21 of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23

AND IN THE MATTER OF [redacted]

Heard at Ottawa, Ontario, on February 10, 2021.

Judgment delivered at Ottawa, Ontario, on August 6, 2021.

REASONS FOR JUDGMENT BY: LASKIN J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

LASKIN J.A.

I. Overview

[1] At issue in this appeal are the meaning and application of the words "within Canada" (and their French counterpart, "dans les limites du Canada") in subsection 16(1) of the *Canadian Security Intelligence Service Act*, R.S.C. 1985, c. C-23. Subsection 16(1) empowers the Canadian Security Intelligence Service, in relation to the defence of Canada or the conduct of international affairs, to assist the Minister of National Defence and the Minister of Foreign Affairs, within Canada, in the collection of information relating to foreign states and persons. By subsection

21(1) of the Act, the Service may apply to a designated judge of the Federal Court for a warrant to enable it to carry out its duties and functions under subsection 16(1).

[2] Do the words "within Canada" preclude the Service from obtaining a warrant under these provisions to collect electronic information [redacted] outside Canada? And, more particularly, do they do so where that information would be requested by Service personnel in Canada **[and received in Canada]** [redacted]?

[3] In the judgment under appeal (2020 FC 757 (public version)), the designated judge of the Federal Court, Gleeson J., answered "yes" to these questions. He rejected the submission of the Attorney General that the words "within Canada" should be interpreted to require only that the assistance and the collection of information take place "from within Canada." He held that on a textual, contextual, and purposive interpretation, the words "within Canada" mean "only in Canada." He determined that, in this case, the activity for which the warrant was sought – the covert collection by Service personnel located in Canada of information that he concluded was [redacted] **[in a foreign state or states]** – would involve an impermissible **[collection]** that would not be "within Canada." He therefore dismissed an application for a warrant authorizing the Service to carry out that activity to assist the Minister [redacted] under subsection 16(1).

[4] The Attorney General of Canada now appeals to this Court. He submits that the decision of the designated judge wrongly impedes the Service's ability to carry out its assistance mandate

under subsection 16(1). He maintains the position that the "within Canada" condition is met where the request for and receipt of information take place "from within Canada." He submits that the designated judge incorrectly failed to do what other courts in Canada and elsewhere have properly done – recognize [the jurisprudence relating to information accessible through the Internet,] and interpret statutory language in a manner that takes account of technological change. He also submits that the issuance of a warrant under section 21 of the Act overcomes any non-compliance with [foreign domestic and/or international law and/or the international law principle of non-intervention.]

[5] The *amici curiae* appointed by the Court respond that the designated judge correctly interpreted and applied subsection 16(1). They also say that the authorities on which the Attorney General relies for his submissions regarding technological change are all distinguishable, and that the activity for which the warrant was sought would breach **[foreign domestic and/or international law and/or the international law principle of non-intervention.]** They further submit that granting the warrant would expose the Service and Canada to the very risks that underlay Parliament's decision to include the territorial restriction in subsection 16(1).

[6] For the reasons set out below, I would dismiss the appeal. While I have carefully considered the submissions of the Attorney General, in my view this is not a proper case in which to rely on the **[jurisprudence relating to information accessible through the Internet]** or the principle that statutory interpretation should take account of technological change. I agree with the designated judges who have considered the scope of section 16 that, in the uniquely important and

sensitive domain of national security, recalibrating the investigative techniques open to the Service in light of significant technological change is a matter for Parliament and not the courts.

[7] In explaining why I reach these conclusions, I will first review the relevant provisions of the Act. Next, I will describe the evidence that was put before the designated judge, and his findings as what **[the proposed collection method for information outside of Canada]** would entail. I will then set out the reasons why, in my view, the designated judge did not err in the manner alleged by the Attorney General in determining, given that evidence and those findings, that a warrant **[to collect this information]** should be refused.

II. Statutory framework

[8] Subsection 16(1) of the Act includes among the duties and functions of the Service assisting the Minister of National Defence, in relation to the defence of Canada, or the Minister of Foreign Affairs, in relation to the conduct of Canada's international affairs, in the collection of information or intelligence relating to the capabilities, intentions or activities of any foreign state or group of foreign states. By subsection 16(3), the Service may provide this assistance only on that Minister's personal written request, and the personal consent in writing of the Minister of Public Safety and Emergency Preparedness. Subsection 16(1) specifies that the assistance provided to the Minister is to be "within Canada," or in the French version, "dans les limites du Canada."

[9] The most relevant text of subsection 16(1) is as follows (underlining added):

Collection of information concerning foreign states and persons	**Assistance**
16 (1) Subject to this section, the Service may, in relation to the defence of Canada or the conduct of the international affairs of Canada, assist the Minister of National Defence or the Minister of Foreign Affairs, within Canada, in the collection of information or intelligence relating to the capabilities, intentions or activities of	16 (1) Sous réserve des autres dispositions du présent article, la Service peut, dans les domaines de la défense et de la conduite des affaires internationales du Canada, prêter son assistance au ministre de la Défense nationale ou au ministre des Affaires étrangères, dans les limites du Canada, à la collecte des informations ou de renseignements sur les moyens, les intentions ou les activités :
(a) any foreign state or group of foreign states […].	a) d'un État étranger ou d'un groupe des États étrangers […].

[10] Sections 16 and 21, as well as sections 12 and 21.1, are reproduced in full in the appendix to these reasons.

[11] In including a "within Canada" limitation, section 16 differs from provisions of the Act that set out other duties and functions of the Service. No other provision includes an express "within Canada" limitation. On the contrary, other provisions of the Act expressly authorize the Service to discharge other duties and functions both within and outside Canada. These provisions reflect amendments made in 2015 (S.C. 2015, c. 9; S.C. 2015, c. 20). No similar amendments were made to section 16.

[12] Subsection 12(1) of the Act sets out the Service's duties and functions in relation to the collection, analysis and retention of information and intelligence respecting threats to the security

of Canada. Subsection 12(2) specifies that, "[f]or greater certainty," the Service may perform these duties and functions "within or outside Canada." Subsection 12.1(1) authorizes the Service, where there are reasonable grounds to believe that a particular activity constitutes a threat to the security of Canada, to take measures, "within or outside Canada," to reduce the threat. Section 13 authorizes the Service to provide security assessments, and section 14, to advise ministers of the Crown on matters relating to the security of Canada or to provide ministers with information relating to security matters or criminal activities relevant to the Minister's duties or functions under the *Citizenship Act*, R.S.C. 1985, c. C-29, or the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. Subsection 15(2) states, "for greater certainty," that the Service may conduct investigations for these purposes "within or outside Canada." The French counterpart to this phrase in all of these provisions is "même à l'extérieur du Canada."

[13] The warrant provisions of the Act also differentiate, in describing their territorial reach, between the Service's threat mandate and its mandate to assist Ministers under section 16. Subsection 21(1) authorizes the Director or a designated employee of the Service, with the approval of the Minister of Public Safety and Emergency Preparedness, to apply to a designated judge for a warrant where the Director or the designated employee believes on reasonable grounds that a warrant is required to enable the Service "to investigate, within or outside Canada, a threat to the security of Canada or to perform its duties and functions under section 16 […]." Here the French counterpart to the expression "within or outside Canada" is "au Canada ou à l'extérieur du Canada."

[14] There is no "within or outside Canada" provision applicable to applications for a warrant to enable the Service to perform its duties and functions under section 16. Rather, the "within Canada" limitation in subsection 16(1) applies where a warrant is sought to enable the Service to perform its section 16 duties and functions.

[15] Subsection 21(3.1) provides that a warrant may authorize activities "outside Canada" ("à l'extérieur du Canada") to enable the Service to investigate a threat to the security of Canada, and may do so "[w]ithout regard to any other law, including that of any foreign state." Again, this provision does not apply to a warrant granted to enable the Service to carry out its mandate under section 16. Similarly, subsections 21.1(1) and (3) provide for the issuance of a warrant, "[d]espite any other law but subject to the *Statistics Act*," authorizing the Service to take measures "within or outside Canada" ("au Canada ou à l'extérieur du Canada") to reduce a threat to the security of Canada. By subsection 21.1(4), a warrant issued under subsection 21.1(3) may authorize measures outside Canada "[w]ithout regard to any other law, including that of any foreign state." A warrant under section 21.1 is available only for the purposes of the Service's mandate to reduce threats to the security of Canada, and not for the purposes of its mandate under section 16.

[16] Subsection 21(2) sets out the matters to be specified in an application for a warrant under subsection 21(1) (the warrant provision available for purposes of section 16). It requires that an application for a warrant for those purposes be accompanied by an affidavit of the applicant deposing to certain specified matters. These include the facts relied on to justify the belief on reasonable grounds that a warrant is necessary to enable the Service to investigate a threat to the security of Canada or to perform its duties and functions under section 16 (paragraph (a)), that

without a warrant it is likely that information of importance with respect to the threat or the duties and functions under section 16 would not be obtained (paragraph (b)), "the type of communication proposed to be intercepted, [and] the type of information, records, documents or things proposed to be obtained […]," (paragraph (c)), and "a general description of the place where the warrant is to be executed, if a general description of that place can be given" (paragraph (f)).

[17] By subsection 21(3), where the judge to whom an application is made is satisfied of the matters referred to in paragraphs 21(2)(a) and (b), the judge may, "[n]otwithstanding any other law but subject to the *Statistics Act*," issue a warrant. A warrant granted under section 21 authorizes the persons to whom it is directed "to intercept any communication or obtain any information, record, document or thing." For that purpose, they may "enter any place or open or obtain access to any thing; […] search for, remove or return, or examine, take extracts from for make copies of or record in any other manner the information, record, document or thing; or […] install, maintain or remove any thing."

III. Prior proceedings

[18] The meaning of the words "within Canada" in subsection 16(1) first came before a designated judge in an application by the Service for warrants against **[a foreign state, group of states or person]**. The warrants sought included a warrant authorizing **[the collection of electronic information]**.

[19] The designated judge who heard that application, Noël J., dismissed the application insofar as it sought a warrant to **[collect the electronic information in a foreign state or states]**

[redacted] (2018 FC 738). He undertook a detailed review of the text, context and purpose of section 16, and (at paras. 72-100) traced the legislative history of the provision, as well as various proposals to amend it by eliminating the "within Canada" limitation.

[20] In doing so, the designated judge sought to identify the perceived risks that underlay the inclusion of the limiting words in section 16. He noted (at para. 74) that the McDonald Commission (Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police), whose 1981 report led to the establishment of the Service, had warned of the "clear political risk in a government directing espionage activities against other states," and suggested that "[t]he image of honesty and straight forwardness in the conduct of international affairs may produce benefits to this country […]." It had also pointed out what it described as the "serious moral issue involved in a government employing a secret agency whose *modus operandi* requires it necessarily to break the laws of other nations."

[21] The designated judge also quoted (at paras. 78-79) from testimony given by the Honourable Robert Kaplan, then Solicitor General, before the Senate committee studying the bill that was a precursor to the Act as adopted. He pointed out that Mr. Kaplan had stated, among other things, that the Service would be "an intelligence gathering agency and its mandate [would be] different from the mandate of a pro-active arm of government, such as the CIA in relation to the American government," and that "[a]nother important difference [was] that this agency [would] perform its functions within Canada." That testimony, the judge stated, made it clear that the government had made the decision that the Service would "not become an agency like the CIA, which can go abroad in a covert fashion to influence foreign events and activities."

[22] The designated judge held that "within Canada" means "only in Canada," and that to adopt a more expansive meaning would amount to rewriting the legislation, a task reserved to Parliament. He found that even if **[the collection]** would be performed "from Canada," a substantial part of **[the collection would occur outside Canada]**. He therefore concluded that he had no jurisdiction to issue a warrant authorizing **[the proposed collection of information in a foreign state or states.]**

[23] The Attorney General appealed the judgment of Noël J. to this Court. This Court dismissed the appeal (2018 FCA 207 (public version)). It did so solely on the basis that the evidence in the record as to how the collection **[of information outside Canada]** would be carried out was not sufficiently informative to permit the Court to properly address the grounds argued in the appeal. It set out a list of 13 questions it considered important for this purpose, but that the record left unanswered. However, it expressly did not foreclose the possibility that in a future warrant application, the evidence might be sufficient to show that granting the authority refused by the designated judge would be consistent with the "within Canada" requirement of subsection 16(1).

[24] The Service subsequently applied for further warrants to obtain information or intelligence relating to **[foreign state, group of states or person.]** In doing so, it asked the designated judge who heard the application, Gleeson J., to provide more clarity on the "within Canada" issue, taking into account the further evidence submitted by the Service aimed at responding to this Court's decision. It expressed what it was seeking as "clarity on whether section 16 allows the Service to provide assistance to the requesting minister by collecting **[electronic information**

without regard to whether the information is inside or outside Canada."]

It is the judgment addressing that issue that is now on appeal to this Court. It is common ground that the result in this appeal will also apply in respect of the warrants sought .

IV. Prior warrants against

[25] For most of the period between and 2018, when the application that has led to this appeal was made, the Service applied for and was granted, for purposes of carrying out its duties and functions under section 16, warrants to collect information about the capabilities, intentions, or activities of **[a foreign state, group of states or person.]** These warrants authorized the Service, among other things, to **[collect the information of foreign persons]** in Canada. The warrants were sought and granted despite **[laws that might prohibit the collection.]** But as noted above, a warrant may be issued under section 21 "notwithstanding any other law."

[26] The **[electronic information]** subject to the warrants included The warrants could be

executed by means including [redacted]

[redacted]

[27] Reports based on information obtained through these warrants were regarded as having high value in illuminating **[the foreign state's, group of state's or person's]** capabilities, intentions, and activities, and in managing [redacted] In the request for the Service's assistance that led to the most recent warrant application, the Minister [redacted] noted among other things that **[it would be difficult to obtain the desired information from open source channels.]** [redacted] In setting out why the information sought was important in relation to **[the statutory basis for the collection]**, the Minister referred to, among other things **[, the issues that engaged Canada's interest in the collection.]** [redacted] The Minister asked that the Service employ the full range of investigative techniques available to it, including warrants under section 21.

[28] However, the Service has found that **[some collection is no longer practical using prior methods, as was also the case in *Within Canada FC*.]** [redacted]

[redacted]

V. The proposed **[method of collection]**

[29] **[Because some collection is no longer practical using prior methods, the Service proposed to gain access to the information it seeks using the proposed collection method. The information collected would be that which is]** responsive to the Minister's request for assistance under subsection 16(1) [redacted]

[30] [The proposed collection method would be initiated, and the information received by the Service, within Canada.] [redacted]

[31] In the affidavit evidence submitted in support of the warrant application, the Service provided further details on [redacted] **[the proposed collection method and the impacts of the collection method inside and outside of Canada.]** [redacted]

[redacted]

VI. **[Evidence on the location of the collection]**

[32] In cross-examination, the *amici* raised with the Service's deponent on technical matters **[information indicating that the information would be collected within specific, knowable states.]** [redacted]

[33] The Service's deponent ultimately acknowledged that, while the Service was unable to verify **[all the particulars of the information, it was very likely from the evidence that the collection occurs in a specific state or states.]** [redacted]

VII. The decision of the designated judge

A. *Factual findings*

[34] The designated judge set out in the following terms (at paragraph 75 of his reasons) what he described as his "key factual findings reached on a balance of probabilities standard."

A. **[Factual finding regarding technological and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it;]**

B. **[Factual finding regarding technological and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it;]**

C. **[Factual finding regarding technological and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it;]**

D. **[Factual finding regarding technological and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it;]**

E. **[Factual finding regarding technological and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it;]**

F. **[Factual finding regarding technological and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it;]**

G. **[Factual finding regarding technological and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it;]**

H. **[Factual finding regarding technological and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it]** is undertaken from within Canada;

I. **[Factual finding regarding technological and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it;]**

J. Once **[factual finding regarding technological and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it]** within Canada, no further human intervention need occur until [redacted];

K. **[Factual finding regarding technological and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it;]**

L. The [proposed method of collection] results in [redacted] access to the information [redacted] and it can be reasonably inferred, in this particular

case, that access is also contrary to **[foreign domestic and/or international law and/or the international law principle of non-intervention;]**

M. **[Factual finding regarding technological and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it;]**

N. **[Factual finding regarding technological and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it;]**

O. **[Factual finding regarding technological and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it]** and no other information is accessible or otherwise impacted; and

P. **[Factual finding regarding technological and/or geopolitical issues related to the information sought and/or the proposed method of obtaining it.]**

[35] The Attorney General does not take issue with these findings. They all, in my view, find support in the record. Finding L reflects the agreement of the Attorney General and the *amici* (recited in paragraph 42 of the designated judge's reasons) that "[t]he Court can reasonably infer that the collection of information in the manner described in the question before the Court will violate [foreign domestic and/or international law and/or the international law principle of non-intervention] over the location in which [aspects of the collection will occur.]

[36] Having set out these findings, the designated judge proceeded to adopt in large measure the analysis of Noël J., referred to above at paragraphs 18 to 22. In the view of the designated judge, the Attorney General had not put this analysis in issue, and adopting it was also consistent with the principle of judicial comity as between judges of the same court. In light of this Court's decision on appeal from the judgment of Noël J., the designated judge saw the issue he had to decide as whether the more detailed record before him led to a different conclusion than that of

Noël J. He agreed with the *amici*'s submission that, to reach a different conclusion, he would have to determine both that (1) the collection of [electronic information] without regard to whether [the information is] inside or outside Canada, [using the proposed method], satisfies the "within Canada" limitation in subsection 16(1) of the Act, and that (2) section 21 of the Act gives the Court jurisdiction to issue a warrant authorizing the Service to engage in activity that, in providing assistance under subsection 16(1), breaches foreign domestic or international law.

B. *"Within Canada"*

[37] In addressing the first of these two issues (beginning at paragraph 82 of his reasons), the designated judge began by considering the Attorney General's submission that section 16 must be interpreted so as to give effect to its relationship with section 21. This submission relied on, among other things, what the Attorney General characterized as the broad language of section 21. The Attorney General submitted, for example, that in providing (in paragraph 21(2)(c) and subsection 21(3)) for a judge to authorize the Service to [collect] information, section 21 does not limit the judge to authorizing [a particular type of collection] and that in stating (in paragraph 21(2)(f)) that even a general description of the place where the warrant may be executed need be given only if it can be given, section 21 de-emphasizes the importance of the place [where information will be collected]. The designated judge (at paragraphs 88 to 91) saw this submission as inconsistent with the evidence before him – evidence that [the proposed collection method] amounted, in the absence of judicial authorization, to an unauthorized

[redacted]

[collection of information.]

[38] The designated judge went on to state (at paragraphs 93 and 94) that he saw section 21 of the Act, together with sections 12 and 12.1, as assisting in interpreting section 16 for another reason. They showed that Parliament had taken a "distinctly different approach" in defining the geographic scope of the Service's separate mandates and the Court's authority to authorize extraterritorial action.

[39] The designated judge then turned (at paragraph 95) to the interpretation of section 16 itself, and to the Attorney General's submission that the phrase "within Canada" should be interpreted to mean "from within Canada." The designated judge could see no persuasive argument in support of that interpretation. It was in his view inconsistent with the literal meaning of "within Canada," which he saw as clear and unambiguous: the assistance authorized by section 16 must occur within the geographic boundaries of Canada.

[40] The Attorney General's interpretation, the designated judge observed (at paragraph 99), was also inconsistent with what he saw as the limited and controlled nature of the mandate conferred by Parliament in section 16. This "legislative principle of limits and controls" was reflected not only in the words "within Canada," but also in the prerequisite that the Minister of National Defence or the Minister of Foreign Affairs personally request the Service's assistance in writing, and in the limitation on the assistance that the Service can provide to the collection of information or intelligence relating to the capabilities, intentions, or activities of foreign states or persons.

[41] The designated judge also found support for the literal interpretation of "within Canada" in the legislative context. He took note again of the contrast between the authority to act extra-territorially specifically provided for in sections 12, 12.1, 15, 21, and 21.1 and the language of subsection 16(1). He found himself, like Noël J., "left to conclude that Parliament intended there to be a meaningful difference between the 'within or outside Canada' mandates [granted to the Service] and the 'within Canada' mandate found in section 16" (at paragraph 104).

[42] As the final element in his interpretation of "within Canada," the designated judge turned (at paragraphs 105 to 108) to the purposive analysis undertaken by Noël J., with which he saw the Attorney General as taking no issue. That analysis concluded that section 16 and its geographic limitation represent Parliament's balancing of Canada's need for high quality foreign intelligence at home and abroad with the protection of Canada's diplomatic and international reputation and continued ability to obtain sensitive security information from cooperative foreign governments. This balance resulted in Parliament conferring on the Service a limited foreign intelligence capability, one that "excludes aggressive 'covert' and 'offensive' activities abroad," so as "to mitigate the political diplomatic and moral risk of conducting foreign intelligence collection, which [has] the potential to breach foreign international law [and] foreign domestic law and bring disrepute to Canada's international reputation […]." Therefore a purposive analysis, the designated judge concluded, also did not support giving the phrase "within Canada" a broader meaning than its literal meaning would suggest.

[43] The designated judge then set out his conclusion on the interpretation of section 16 in these terms (at paragraphs 110 and 111):

> Reading the words of section 16 in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament, I am unable to conclude that assistance "within Canada … in the collection of information and intelligence" can be interpreted as meaning that the assistance [redacted] need only occur "from" within Canada. The words in context require the assistance [redacted] occur within Canada.
>
> Justice Noël concluded that the correct interpretation of the words "within Canada" means "only in Canada". I agree with that conclusion.

[44] However, the designated judge added a qualification (at paragraph 112). "The restriction 'only in Canada,'" he stated, "does not […] require that every step, action or element of the proposed collection activity occur within Canada." Referring back to his conclusion that Parliament's intention in imposing the geographic limitation in subsection 16(1) was to avoid "aggressive 'covert' and 'offensive' activities abroad," he stated that "section 16, properly interpreted, prohibits collection activities that involve extraterritorial actions that run contrary to Parliament's intent or attract the risks that Parliament sought to mitigate." "This," he added, "must be determined on a case by case basis."

[45] In the case before him, he went on to state (at paragraph 113), the [redacted] evidence showed that the [proposed collection method] would be used to access [redacted] information that [redacted] [is outside Canada.] [redacted] His conclusion that the use of [the proposed collection method] would be contrary to section 16 was limited to the facts he had found. These facts did not, he stated, "disclose a situation where [the information is known to be outside of any state."] [redacted]

Without commenting further on those possible scenarios, he "[acknowledged] that other

circumstances might allow one to conclude the employment of [the proposed collection method] would be consistent with the within Canada requirement at section 16 but [expressed] no opinion in this regard."

C. *The [jurisprudence relating to information accessible through the Internet]*

[46] Having reached his conclusion on the meaning and application, on the facts before him, of the words "within Canada" in section 16, the designated judge nonetheless went on to consider (beginning at paragraph 115) the Attorney General's submission that the proposed use of [the collection method] could be authorized based on what was referred to as the [jurisprudence relating to information accessible through the Internet.] This is a body of case law that recognizes that

[47] In considering the Attorney General's submission, the designated judge discussed [Canadian case law.] He made no mention of the analogous case law developed by courts in the United States, on which the Attorney General also relied.

[48] [Paragraphs 48 and 49 are a discussion of jurisprudence relating to information accessible through the Internet.]

[redacted]

[49] [redacted]

[50] In this case, the designated judge expressed the view (at paragraphs 126 to 130) that the [redacted] jurisprudence did not assist the Attorney General. Among other things, it was reasonable to infer that the use of

[redacted] [the proposed collection method involved elements that would violate foreign domestic and/or international law and/or the international law principle of non-intervention.]

[The proposed collection method] [redacted] was not the kind of international practice, and did not reflect the international comity, relied on [in the jurisprudence relating to information accessible through the Internet]. Nor either in [the jurisprudence] did the relevant legislation include an express limit on extraterritorial activity of the kind found in section 16.

[51] On the facts before him, the designated judge stated (at paragraph 129), he could not find the real and substantial connection that would be necessary to bring the [redacted] jurisprudence into play. While courts must recognize technological change and interpret legislation so as to reflect current day technological reality, advancements in technology were, he stated (at paragraph 130), not a basis on which a court could adopt an interpretation that ran counter to the plain meaning or the underlying purpose of the statute.

D. *The designated judge's conclusion*

[52] The designated judge thus concluded (at paragraphs 131 and 132) that section 16 limits assistance to that which occurs within the geographic limits of Canada, and that assistance will conform to this limitation where "all 'significant assistance or collection activity occurs only' within Canada." While what is "significant" is to be assessed on a case by case basis, it would "minimally include," he stated, "(1) all legally relevant and consequential activity; and (2) all activity that attracts the very risks Parliament has sought to mitigate in adopting the geographic limitation found at section 16 of the Act." This would ordinarily include, absent some indication by Parliament otherwise, activity that is contrary to international law and the principle of non-intervention. Here, the designated judge determined, [the proposed collection method] would involve significant activity outside Canada that is legally relevant and that also invites the very risks that Parliament sought to mitigate.

[53] It followed for the designated judge that, on the facts before him, the proposed use of [the collection method] would not satisfy the "within Canada" limitation, so that the authorization sought must be refused. The designated judge agreed with Noël J. that to conclude

otherwise would usurp the role of Parliament. He also held that there is no authority under section 21, where a warrant was sought to enable the Service to provide assistance under section 16, to approve activity in a foreign state that would breach

[foreign domestic and/or international law and/or the international law principle of non-intervention in respect of specific foreign countries.]

VIII. Issues and standard of review

[54] The core issue in this appeal is whether the designated judge erred in determining that the "within Canada" limitation in subsection 16(1) of the *Canadian Security Intelligence Service Act* precludes a judge acting under section 21 of the Act, in an application for a warrant to enable the Service to perform its duties and functions under section 16, from issuing a warrant authorizing persons who are located in Canada to

[use the proposed collection method to obtain information]

outside Canada.

[55] Depending in part on the disposition of the first issue, a second issue may also require consideration: whether, in the same circumstances as those contemplated by the first issue, the designated judge erred in determining that a judge acting under section 21 may not issue a warrant authorizing section 16 activity [outside Canada] that breaches

[foreign domestic and/or international law and/or the international law principle of non-intervention.]

[56] The designated judge's determinations of these issues raise questions of law, which are subject to review on the correctness standard. First, as the Attorney General submits, in the

analogous criminal law context, whether on the facts [a collection] meets the legal prerequisites to be authorized by law is treated as a question of law: *R. v. MacKenzie*, 2013 SCC 50 at para. 54. Second, the designated judge's determinations raise questions of statutory interpretation, and therefore questions of law: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8; *TELUS Communications Inc. v. Wellman*, 2019 SCC 19 at para. 30. Third, to the extent that the determinations in issue can be characterized as raising questions of mixed fact and law, the Attorney General does not challenge any factual findings of the designated judge, but submits that the judge erred in his interpretive approach to section 16. A challenge of this nature raises an extricable question of law.

IX. Analysis

A. *The first issue: the "within Canada" limitation*

[57] The Attorney General submits that the designated judge erred in law in deciding the first issue. The principal errors, the Attorney General submits, were in (1) failing to recognize [the difficulty of assigning a location to information in this context;] (2) failing to find that conduct undertaken "from within Canada" satisfies the "within Canada" requirement of section 16; (3) failing to follow the [jurisprudence relating to information accessible through the Internet;] and (4) failing to take account of technological change in assigning meaning to the phrase "within Canada."

[58] I will consider each of these arguments in turn.

(1) **[The location of the collection]**

[59] The Attorney General submits that the designated judge erred in [assigning a location to a certain aspect of the collection.] On a proper understanding of what would occur, he submits, the [location of the collection] was irrelevant, because the Service's focus was on accessing [the information].

[60] I see no error by the designated judge in this respect. The characterization of [some aspects of the collection] specified in the warrant application cannot be determinative. On the record before him, the designated judge found, among other things, that [the successful employment of the collection method results in access to information in a specific and knowable place or places] see paragraph 34 above, finding K. The [evidence] further demonstrates that [the location of the collection] is far from irrelevant, whatever the Service's focus might be.

(2) "From within Canada"

[61] The Attorney General submits that the designated judge erred in failing to find that "within Canada" should be interpreted to mean "from within Canada." On this interpretation, he submits, the facts found by the designated judge would be sufficient to meet the "within Canada" requirement: see paragraph 34 above, findings H and J.

[62] I would not give effect to this submission. As Professor Sullivan points out, there is a significant difference between reading down a statute found to be over-inclusive and reading additional words in to that statute – as the Attorney General proposes – to address what is considered under-inclusion. The general rule is that "reading down to cure over-inclusion is considered interpretation, provided it can be justified, whereas reading in to cure under-inclusion is considered amendment and must be left to the legislature": *Sullivan on the Construction of Statutes*, 6th ed. (LexisNexis Canada Inc. 2014) at §12.16; see also *R. v. Shubley*, [1990] 1 S.C.R. 3 at 26; *Canada (Attorney General) v. Vorobyov*, 2014 FCA 102 at para. 33. In this sense, as Professor Sullivan goes on to say, the words of a statute "impose an outer limit on meaning, and normally there is only limited room for expansion between the ordinary meaning of a provision and the outer limit fixed by its words."

[63] I appreciate that there might be seen to be some support for the "from within Canada" interpretation in the decision of Mosley J. sitting as a designated judge in *X (Re)*, 2009 FC 1058 (public version) at para. 60. There he stated his agreement with the proposition that "the jurisdictional requirements for the issuance of a warrant under section 21 are satisfied where the authorization sought is to obtain information from within Canada." But the activities for which a warrant was sought in that case were for purposes of the Service's section 12 mandate, not its duties and functions under section 16. Therefore, no interpretation of "within Canada" or consideration of its limits was called for or conducted.

[64] I would accordingly reject the Attorney General's second submission.

(3) Failing to apply the [jurisprudence relating to information accessible through the Internet]

[65] I agree with the Attorney General that the [redacted] case law establishes a rule of general application.

[Discussion of the Canadian jurisprudence.]

[redacted]

[66] But I agree with the designated judge that the [redacted] case law does not in the end assist the Attorney General. [redacted]

[Discussion of why the Canadian jurisprudence is not applicable in this context.]

[redacted]

[67] The Attorney General is also critical of the designated judge for failing to refer to the jurisprudence in the United States that takes an approach similar to that reflected in the

[redacted] case law. But as the Attorney General recognizes, the American case law is at most of persuasive value. In any event, the fact that no express reference was made to it does not mean it was not considered: *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157 at paras. 67-69.

[68] Before leaving the [jurisprudence relating to information accessible through the Internet], I should note that the premise, put forward by the Attorney General, that the principle could establish a "real and substantial connection" [redacted] sufficient to meet the "within Canada" requirement of section 16 is, in any event, questionable. As the *amici* submit, "real and substantial connection" and "within Canada" are very different. The former is a threshold test, grounded in international comity, that sets a necessary minimum connection to Canada that a matter must have in order to justify Canada's exercise of jurisdiction. The latter is a statutory territorial restriction, which limits the Service's foreign intelligence assistance mandate under section 16 regardless of the degree of connection with the [redacted] from which intelligence is sought. And as the designated judge observed (at paragraph 128 of his reasons, [redacted] "[t]he real and substantial connection test is intended to prevent overreach in the exercise of extraterritorial jurisdiction […], not to promote it."

[69] However, based on my conclusions above, nothing more need be said on this issue to dispose of the Attorney General's submission based on the

[jurisprudence relating to information accessible through the Internet.]

(4) Failing to take account of technological change

[70] There is no dispute that the "modern approach" to statutory interpretation should be applied in interpreting the expression "within Canada" in section 16. This approach requires that these words "be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 1998 CanLII 837.

[71] Interpretation of the language of a federal statute should also take into account, except where a contrary intention appears, the rules set out in the *Interpretation Act*, R.S.C. 1985, c. I-21, as well as any applicable common law rules of statutory interpretation: *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67 at para. 42; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 117-118; *Interpretation Act*, s. 3(1).

[72] One interpretive rule that requires consideration here is the rule, codified in section 10 of the *Interpretation Act*, that "[t]he law shall be considered as always speaking […]:"

10 The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.	10 La règle de droit a vocation permanente; exprimé sans un texte au présent intemporel, elle s'applique à la situation du moment de façon que le texte produise ses effets selon son esprit, son sens et son objet.

[73] A corollary of this rule is that "[p]reserving the original intention of Parliament or the legislatures frequently requires a dynamic approach to interpreting their enactments, sensitive to evolving social and material realities": *R. v. 974649 Ontario Inc.*, 2001 SCC 81 at para. 38; *R. v.*

Stucky, 2009 ONCA 151 at paras. 29-30, 49, leave to appeal granted, [2009] S.C.C.A. No. 186; Ruth Sullivan, *Sullivan on the Construction of Statutes* at §6.6).

[74] These "evolving social and material realities" may include advances in technology that did not exist when the provision to be interpreted was enacted: see, for example, [redacted] *John v. Ballingal*, 2017 ONCA 579 at para. 24, leave to appeal refused [2017] S.C.C.A. No. 377; *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174 at para. 125. Here, of course, the modern internet had not yet been created, [and other advances in technology that had not occurred] when sections 16 and 21 were enacted in 1984.

[75] In urging on us that the designated judge failed to interpret "within Canada" in a manner that took account of technological change, the Attorney General relies in particular on two decisions of the Supreme Court of Canada: [redacted]

[76] As the Attorney General acknowledged in oral argument, these cases are not entirely analogous to the case before us. For one thing, they involve the impact of technological developments on privacy interests, a subject which is not directly in issue here. For another, they reflect judicial adaptation of [redacted] doctrine that is largely judge-made, rather than a discrete question of statutory interpretation.

[77] The question nonetheless remains whether, as the Attorney General submits, the designated judge erred in failing to take account of technological change, and in so doing took an inappropriately static, rather than a dynamic, approach to the interpretation of "within Canada." I would answer this question in the negative.

[78] It is not every interpretive exercise that calls for a dynamic approach. Courts have declined to take this approach where, for example, doing so would raise issues of policy more suited for legislative resolution: see *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76 at para. 155; *Bishop v. Stevens*, [1990] 2 S.C.R. 467 at 483-484; *Canada (Citizenship and Immigration) v. Kandola*, 2014 FCA 85 at paras. 75-80; *Bell ExpressVu Inc. v. City of Winnipeg*, 2010 MBQB 26 at paras. 62-64. They will also be reluctant to do so when Parliament has already addressed, albeit in a different manner, the "new social realities" on which the party seeking a dynamic interpretation relies: *Symes v. Canada*, [1991] 3 F.C. 507 at 522-523, 529 (C.A.), affirmed [1993] 4 S.C.R. 695.

[79] As noted above, the "within Canada" restriction on the Service's section 16 mandate was left unchanged in 2015 when amendments were made that expressly authorized the Service to

discharge other duties and functions both within and outside Canada. I agree with the *amici* that whether the "within Canada" limitation should be relaxed engages policy issues. They include whether Canada should engage in the collection of foreign intelligence involving extraterritorial activity, and if so what department or agency of government should be authorized to conduct it. These issues have persisted at least since the McDonald Commission Report was published in 1981. Their presence, and their complexities, counsel caution on the part of the courts.

[80] Judicial caution is all the more appropriate, in my view, now that Parliament has established a mechanism for identifying, and recommending measures to address, any perceived deficiencies in the legislative framework governing security and intelligence. In 2017, Parliament enacted the *National Security and Intelligence Committee of Parliamentarians Act*, S.C. 2017, c. 15 (the "NSICOP Act"). The NSICOP Act establishes a committee comprising a chair and up to 10 other members, each of whom must be a member of either House of Parliament other than a minister of the Crown, a minister of state or a parliamentary secretary. By paragraph 8(1)(a) of the NSICOP Act, the Committee's mandate includes reviewing "the legislative, regulatory, policy, administrative and financial framework for national security and intelligence." By paragraph 8(1)(c), it is also charged with reviewing any matter relating to national security or intelligence referred to it by a minister of the Crown.

[81] As the Committee itself has described it, its "unprecedented" review mandate is a broad one; it extends to "identifying where gaps may exist in legislation, policies, or governance," and "[looking] at issues from a government-wide perspective": Canada, National Security and Intelligence Committee of Parliamentarians, *Annual Report 2018* at paras. 25-26. In its 2019

Annual Report, the Committee identified the impact of evolving information technology as a potential subject for review, noting that "[t]he ability of police and intelligence organizations to obtain information under existing legal authorities has steadily diminished with the evolution of information technology […]": Canada, National Security and Intelligence Committee of Parliamentarians, *Annual Report 2019*, Chair's Message.

[82] As noted above, the designated judge (at paragraph 130 of his reasons) took no issue with the need for courts to interpret legislation in light of technological change. However, he concluded that in this case, given the plain meaning, purpose and context of the legislation, technological change could not provide a basis for interpreting "within Canada" as the Attorney General proposed. I see no reversible error in this conclusion, especially when the issue is policy-laden and the NSICOP Act provides a mechanism to identify and propose means to address perceived legislative deficiencies.

B. *Authorizing breaches of* **[foreign domestic and/or international law and/or the international law principle of non-intervention]**

[83] I do not propose to address the question of non-compliance with **[foreign domestic and/or international law and/or the international law principle of non-intervention.]** If the Service lacks in the first place the authority to carry out the activity for which the warrant was sought, the question does not arise. If in the future Parliament should consider it appropriate to grant the Service this authority, it can address the question of compliance with **[foreign domestic and/or international law and/or the international law principle of non-intervention]** in the context of legislative change, as it did, for example, in enacting subsection 21(3.1) of the Act in 2015. As

noted above, this subsection expressly provides for the issuance of a warrant authorizing activities outside Canada to enable investigation of a threat to the security of Canada "[w]ithout regard to any other law, including that of any foreign state."

X. Proposed disposition

[84] I would dismiss the appeal.

"J.B. Laskin"
J.A.

"I agree
Yves de Montigny J.A"

"I agree
Anne L. Mactavish J.A"

APPENDIX

Canadian Security Intelligence Service Act, R.S.C. 1985, c. C-23, ss. 12, 16, 21 and 21.1

[…]	[…]
Collection, analysis and retention	**Informations et renseignements**
12 (1) The Service shall collect, by investigation or otherwise, to the extent that it is strictly necessary, and analyse and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting threats to the security of Canada and, in relation thereto, shall report to and advise the Government of Canada.	**12 (1)** Le Service recueille, au moyen d'enquêtes ou autrement, dans la mesure strictement nécessaire, et analyse et conserve les informations et renseignements sur les activités dont il existe des motifs raisonnables de soupçonner qu'elles constituent des menaces envers la sécurité du Canada; il en fait rapport au gouvernement du Canada et le conseille à cet égard.
No territorial limit	**Aucune limite territoriale**
(2) For greater certainty, the Service may perform its duties and functions under subsection (1) within or outside Canada.	**(2)** Il est entendu que le Service peut exercer les fonctions que le paragraphe (1) lui confère même à l'extérieur du Canada.
Measures to reduce threats to the security of Canada	**Mesures pour réduire les menaces envers la sécurité du Canada**
12.1 (1) If there are reasonable grounds to believe that a particular activity constitutes a threat to the security of Canada, the Service may take measures, within or outside Canada, to reduce the threat.	**12.1 (1)** S'il existe des motifs raisonnables de croire qu'une activité donnée constitue une menace envers la sécurité du Canada, le Service peut prendre des mesures, même à l'extérieur du Canada, pour réduire la menace.

Limits

(2) The measures shall be reasonable and proportional in the circumstances, having regard to the nature of the threat, the nature of the measures, the reasonable availability of other means to reduce the threat and the reasonably foreseeable effects on third parties, including on their right to privacy.

Alternatives

(3) Before taking measures under subsection (1), the Service shall consult, as appropriate, with other federal departments or agencies as to whether they are in a position to reduce the threat.

Canadian Charter of Rights and Freedoms

(3.1) The *Canadian Charter of Rights and Freedoms* is part of the supreme law of Canada and all measures taken by the Service under subsection (1) shall comply with it.

Warrant — *Canadian Charter of Rights and Freedoms*

(3.2) The Service may take measures under subsection (1) that would limit a right or freedom guaranteed by the *Canadian Charter of Rights and Freedoms* only if a judge, on an application made under section 21.1, issues a warrant authorizing the taking of those measures.

Condition for issuance

(3.3) The judge may issue the warrant referred to in subsection (3.2) only if he or she is satisfied that the measures, as authorized by the

Limites

(2) Les mesures doivent être justes et adaptées aux circonstances, compte tenu de la nature de la menace et des mesures, des solutions de rechange acceptables pour réduire la menace et des conséquences raisonnablement prévisibles sur les tierces parties, notamment sur leur droit à la vie privée.

Autres options

(3) Avant de prendre des mesures en vertu du paragraphe (1), le Service consulte, au besoin, d'autres ministères ou organismes fédéraux afin d'établir s'ils sont en mesure de réduire la menace.

Charte canadienne des droits et libertés

(3.1) La *Charte canadienne des droits et libertés* fait partie de la loi suprême du Canada et toutes les mesures prises par le Service en vertu du paragraphe (1) s'y conforment.

Mandat — *Charte canadienne des droits et libertés*

(3.2) Le Service ne peut, en vertu du paragraphe (1), prendre des mesures qui limiteraient un droit ou une liberté garanti par la *Charte canadienne des droits et libertés* que si, sur demande présentée au titre de l'article 21.1, un juge décerne un mandat autorisant la prise de ces mesures.

Condition

(3.3) Le juge ne peut décerner le mandat visé au paragraphe (3.2) que s'il est convaincu que les mesures, telles qu'autorisées par le mandat,

warrant, comply with the *Canadian Charter of Rights and Freedoms*.

sont conformes à la *Charte canadienne des droits et libertés*.

Warrant — Canadian law

(3.4) The Service may take measures under subsection (1) that would otherwise be contrary to Canadian law only if the measures have been authorized by a warrant issued under section 21.1.

Mandat — droit canadien

(3.4) Le Service ne peut, en vertu du paragraphe (1), prendre des mesures qui seraient par ailleurs contraires au droit canadien que si ces mesures ont été autorisées par un mandat décerné au titre de l'article 21.1.

Notification of Review Agency

(3.5) The Service shall, after taking measures under subsection (1), notify the Review Agency of the measures as soon as the circumstances permit.

Avis à l'Office de surveillance

(3.5) Dans les plus brefs délais possible après la prise de mesures en vertu du paragraphe (1), le Service avise l'Office de surveillance de ces mesures.

Clarification

(4) For greater certainty, nothing in subsection (1) confers on the Service any law enforcement power.

Précision

(4) Il est entendu que le paragraphe (1) ne confère au Service aucun pouvoir de contrôle d'application de la loi.

[…]

[…]

Collection of information concerning foreign states and persons

16 (1) Subject to this section, the Service may, in relation to the defence of Canada or the conduct of the international affairs of Canada, assist the Minister of National Defence or the Minister of Foreign Affairs, within Canada, in the collection of information or intelligence relating to the capabilities, intentions or activities of

Assistance

16 (1) Sous réserve des autres dispositions du présent article, le Service peut, dans les domaines de la défense et de la conduite des affaires internationales du Canada, prêter son assistance au ministre de la Défense nationale ou au ministre des Affaires étrangères, dans les limites du Canada, à la collecte d'informations ou de renseignements sur les moyens, les intentions ou les activités :

(a) any foreign state or group of foreign states; or

a) d'un État étranger ou d'un groupe d'États étrangers;

(b) any person other than.

(i) a Canadian citizen,

(ii) a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, or

(iii) a corporation incorporated by or under an Act of Parliament or of the legislature of a province.

Limitation

(2) The assistance provided pursuant to subsection (1) shall not be directed at any person referred to in subparagraph (1)(b)(i), (ii) or (iii).

Personal consent of Ministers required

(3) The Service shall not perform its duties and functions under subsection (1) unless it does so

(a) on the personal request in writing of the Minister of National Defence or the Minister of Foreign Affairs; and

(b) with the personal consent in writing of the Minister.

[…]

b) d'une personne qui n'appartient à aucune des catégories suivantes :

(i) les citoyens canadiens,

(ii) les résidents permanents au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*,

(iii) les personnes morales constituées sous le régime d'une loi fédérale ou provinciale.

Restriction

(2) L'assistance autorisée au paragraphe (1) est subordonnée au fait qu'elle ne vise pas des personnes mentionnées à l'alinéa (1)b).
L'assistance autorisée au paragraphe (1) est subordonnée au fait qu'elle ne vise pas des personnes mentionnées à l'alinéa (1)b).

Consentement personnel des ministres

(3) L'exercice par le Service des fonctions visées au paragraphe (1) est subordonné :

a) à une demande personnelle écrite du ministre de la Défense nationale ou du ministre des Affaires étrangères;

b) au consentement personnel écrit du ministre.

[…]

Application for warrant

21 (1) If the Director or any employee designated by the Minister for the purpose believes, on reasonable grounds, that a warrant under this section is required to enable the Service to investigate, within or outside Canada, a threat to the security of Canada or to perform its duties and functions under section 16, the Director or employee may, after having obtained the Minister's approval, make an application in accordance with subsection (2) to a judge for a warrant under this section.

Demande de mandat

21 (1) Le directeur ou un employé désigné à cette fin par le ministre peut, après avoir obtenu l'approbation du ministre, demander à un juge de décerner un mandat en conformité avec le présent article s'il a des motifs raisonnables de croire que le mandat est nécessaire pour permettre au Service de faire enquête, au Canada ou à l'extérieur du Canada, sur des menaces envers la sécurité du Canada ou d'exercer les fonctions qui lui sont conférées en vertu de l'article 16.

Retention of information — incidental collection

(1.1) The applicant may, in an application made under subsection (1), request the judge to authorize the retention of the information that is incidentally collected in the execution of a warrant issued for the purpose of section 12, in order to constitute a dataset.

Conservation d'informations recueillies de manière incidente

(1.1) Le demandeur peut, dans le cadre d'une demande visée au paragraphe (1), demander au juge d'autoriser la conservation d'informations recueillies de manière incidente lors de l'exécution d'un mandat décerné au titre de l'article 12 en vue de la constitution d'un ensemble de données.

Matters to be specified in application for warrant

(2) An application to a judge under subsection (1) shall be made in writing and be accompanied by an affidavit of the applicant deposing to the following matters, namely,

(a) the facts relied on to justify the belief, on reasonable grounds, that a warrant under this section is required to enable the Service to investigate a threat to the security of Canada or to perform its duties and functions under section 16;

Contenu de la demande

(2) La demande visée au paragraphe (1) est présentée par écrit et accompagnée de l'affidavit du demandeur portant sur les points suivants :

a) les faits sur lesquels le demandeur s'appuie pour avoir des motifs raisonnables de croire que le mandat est nécessaire aux fins visées au paragraphe (1);

(b) that other investigative procedures have been tried and have failed or why it appears that they are unlikely to succeed, that the urgency of the matter is such that it would be impractical to carry out the investigation using only other investigative procedures or that without a warrant under this section it is likely that information of importance with respect to the threat to the security of Canada or the performance of the duties and functions under section 16 referred to in paragraph (a) would not be obtained;

b) le fait que d'autres méthodes d'enquête ont été essayées en vain, ou la raison pour laquelle elles semblent avoir peu de chances de succès, le fait que l'urgence de l'affaire est telle qu'il serait très difficile de mener l'enquête sans mandat ou le fait que, sans mandat, il est probable que des informations importantes concernant les menaces ou les fonctions visées au paragraphe (1) ne pourraient être acquises;

(c) the type of communication proposed to be intercepted, the type of information, records, documents or things proposed to be obtained and the powers referred to in paragraphs (3)(a) to (c) proposed to be exercised for that purpose;

c) les catégories de communications dont l'interception, les catégories d'informations, de documents ou d'objets dont l'acquisition, ou les pouvoirs visés aux alinéas (3)a) à c) dont l'exercice, sont à autoriser;

(d) the identity of the person, if known, whose communication is proposed to be intercepted or who has possession of the information, record, document or thing proposed to be obtained;

d) l'identité de la personne, si elle est connue, dont les communications sont à intercepter ou qui est en possession des informations, documents ou objets à acquérir;

(d.1) when it is anticipated that information would be incidentally collected in the execution of a warrant, the grounds on which the retention of the information by the Service is likely to assist it in the performance of its duties or functions under sections 12, 12.1 and 16;

d.1) lorsqu'il est envisagé que des informations seront recueillies de manière incidente lors de l'exécution du mandat, sur quels motifs il est probable que la conservation de ces informations aidera le Service dans l'exercice des fonctions qui lui sont conférées en vertu des articles 12, 12.1 et 16;

(e) the persons or classes of persons to whom the warrant is proposed to be directed;

e) les personnes ou catégories de personnes destinataires du mandat demandé;

(f) a general description of the place where the warrant is proposed to be executed, if a general description of that place can be given;

f) si possible, une description générale du lieu où le mandat demandé est à exécuter;

(g) the period, not exceeding sixty days or one year, as the case may be, for which the warrant is requested to be in force that is applicable by virtue of subsection (5); and

g) la durée de validité applicable en vertu du paragraphe (6), de soixante jours ou de cent vingt jours au maximum, selon le cas, demandée pour le mandat;

(h) any previous application made under subsection (1) in relation to a person who is identified in the affidavit in accordance with paragraph (d), the date on which each such application was made, the name of the judge to whom it was made and the judge's decision on it.

h) la mention des demandes antérieures présentées au titre du paragraphe (1) touchant des personnes visées à l'alinéa d), la date de chacune de ces demandes, le nom du juge à qui elles ont été présentées et la décision de celui-ci dans chaque cas.

Issuance of warrant

Délivrance du mandat

(3) Notwithstanding any other law but subject to the *Statistics Act*, where the judge to whom an application under subsection (1) is made is satisfied of the matters referred to in paragraphs (2)(a) and (b) set out in the affidavit accompanying the application, the judge may issue a warrant authorizing the persons to whom it is directed to intercept any communication or obtain any information, record, document or thing and, for that purpose,

(3) Par dérogation à toute autre règle de droit mais sous réserve de la *Loi sur la statistique*, le juge à qui est présentée la demande visée au paragraphe (1) peut décerner le mandat s'il est convaincu de l'existence des faits qui sont mentionnés aux alinéas (2)a) et c) et énoncés dans l'affidavit qui accompagne la demande; le mandat autorise ses destinataires à prendre les mesures qui y sont indiquées. À cette fin, il peut autoriser aussi, de leur part:

(a) to enter any place or open or obtain access to any thing;

a) l'accès à un lieu ou un objet ou l'ouverture d'un objet;

(b) to search for, remove or return, or examine, take extracts from or make copies of or record in any other manner the information, record, document or thing; or

b) la recherche, l'enlèvement ou la remise en place de tout document ou objet, leur examen, le prélèvement des informations qui s'y trouvent, ainsi que leur enregistrement et

l'établissement de copies ou d'extraits par tout procédé;

(c) to install, maintain or remove any thing.

c) l'installation, l'entretien et l'enlèvement d'objets;

Retention of information

(3.01) If the judge to whom the application is made is satisfied that the retention of the information that is incidentally collected in the execution of a warrant is likely to assist the Service in the performance of its duties or functions under sections 12, 12.1 and 16, the judge may, in a warrant issued under this section, authorize the retention of the information requested in subsection (1.1), in order to constitute a dataset.

Conservation d'informations

(3.01) S'il est convaincu qu'il est probable que la conservation d'informations recueillies de manière incidente lors de l'exécution du mandat aidera le Service dans l'exercice des fonctions qui lui sont conférées en vertu des articles 12, 12.1 et 16, le juge à qui est présentée la demande visée au paragraphe (1.1) peut autoriser, dans le mandat décerné en vertu du présent article, la conservation des données recueillies en vue de la constitution d'un ensemble de données.

Activities outside Canada

(3.1) Without regard to any other law, including that of any foreign state, a judge may, in a warrant issued under subsection (3), authorize activities outside Canada to enable the Service to investigate a threat to the security of Canada**.**

Activités à l'extérieur du Canada

(3.1) Sans égard à toute autre règle de droit, notamment le droit de tout État étranger, le juge peut autoriser l'exercice à l'extérieur du Canada des activités autorisées par le mandat décerné, en vertu du paragraphe (3), pour permettre au Service de faire enquête sur des menaces envers la sécurité du Canada.

Matters to be specified in warrant

(4) There shall be specified in a warrant issued under subsection (3)

Contenu du mandat

(4) Le mandat décerné en vertu du paragraphe (3) porte les indications suivantes :

(a) the type of communication authorized to be intercepted, the type of information, records, documents or things authorized to be obtained and the powers referred to in paragraphs

a) les catégories de communications dont l'interception, les catégories d'informations, de documents ou d'objets dont l'acquisition, ou les pouvoirs visés aux alinéas (3)a) à c) dont l'exercice, sont autorisés;

(3)(a) to (c) authorized to be exercised for that purpose;

(b) the identity of the person, if known, whose communication is to be intercepted or who has possession of the information, record, document or thing to be obtained;

b) l'identité de la personne, si elle est connue, dont les communications sont à intercepter ou qui est en possession des informations, documents ou objets à acquérir;

(c) the persons or classes of persons to whom the warrant is directed;

c) les personnes ou catégories de personnes destinataires du mandat;

(d) a general description of the place where the warrant may be executed, if a general description of that place can be given;

d) si possible, une description générale du lieu où le mandat peut être exécuté;

(d.1) an indication as to whether information collected incidentally in the execution of the warrant may be retained under subsection (1.1);

d.1) la réponse à la question de savoir si des informations recueillies de manière incidente lors de l'exécution du mandat peuvent être conservées aux termes du paragraphe (1.1);

(e) the period for which the warrant is in force; and

e) la durée de validité du mandat;

(f) such terms and conditions as the judge considers advisable in the public interest.

f) les conditions que le juge estime indiquées dans l'intérêt public.

Datasets

Ensembles de données

(4.1) If the Service is authorized to retain information in accordance with subsection (1.1) in order to constitute a dataset that the Service may collect under this Act, that dataset is deemed to be collected under section 11.05 on the first day of the period for which the warrant is in force.

(4.1) Lorsque le Service conserve des données en vertu d'une autorisation accordée au titre du paragraphe (1.1) en vue de la constitution d'un ensemble de données qu'il peut recueillir en vertu de la présente loi, cet ensemble est réputé recueilli en vertu de l'article 11.05 en date du premier jour prévu pour la période de validité du mandat.

Maximum duration of warrant

(5) A warrant shall not be issued under subsection (3) for a period exceeding

(a) sixty days where the warrant is issued to enable the Service to investigate a threat to the security of Canada within the meaning of paragraph (d) of the definition of that expression in section 2; or

(b) one year in any other case**.**

Application for warrant — measures to reduce threats to security of Canada

21.1 (1) If the Director or any employee who is designated by the Minister for the purpose believes on reasonable grounds that a warrant under this section is required to enable the Service to take measures referred to in subsection (1.1), within or outside Canada, to reduce a threat to the security of Canada, the Director or employee may, after having obtained the Minister's approval, make an application in accordance with subsection (2) to a judge for a warrant under this section.

Measures

(1.1) For the purpose of subsection (1), the measures are the following:

Durée maximale

(5) Il ne peut être décerné de mandat en vertu du paragraphe (3) que pour une période maximale :

a) de soixante jours, lorsque le mandat est décerné pour permettre au Service de faire enquête sur des menaces envers la sécurité du Canada au sens de l'alinéa d) de la définition de telles menaces contenue à l'article 2;

b) d'un an, dans tout autre cas.

Demande de mandat — mesures pour réduire les menaces envers la sécurité du Canada

21.1 (1) Le directeur ou un employé désigné à cette fin par le ministre peut, après avoir obtenu l'approbation du ministre, demander à un juge de décerner un mandat en conformité avec le présent article s'il a des motifs raisonnables de croire que le mandat est nécessaire pour permettre au Service de prendre, au Canada ou à l'extérieur du Canada, les mesures prévues au paragraphe (1.1) pour réduire une menace envers la sécurité du Canada.

Mesures

(1.1) Pour l'application du paragraphe (1), les mesures sont les suivantes :

(a) altering, removing, replacing, destroying, disrupting or degrading a communication or means of communication;

a) modifier, enlever, remplacer, détruire, interrompre ou détériorer des communications ou des moyens de communication;

(b) altering, removing, replacing, destroying, degrading or providing — or interfering with the use or delivery of — any thing or part of a thing, including records, documents, goods, components and equipment;

b) modifier, enlever, remplacer, détruire, détériorer ou fournir tout ou partie d'un objet, notamment des registres, des documents, des biens, des composants et du matériel, ou en entraver la livraison ou l'utilisation;

(c) fabricating or disseminating any information, record or document;

c) fabriquer ou diffuser de l'information, des registres ou des documents;

(d) making or attempting to make, directly or indirectly, any financial transaction that involves or purports to involve currency or a monetary instrument;

d) effectuer ou tenter d'effectuer, directement ou indirectement, des opérations financières qui font intervenir ou qui paraissent faire intervenir des espèces ou des effets;

(e) interrupting or redirecting, directly or indirectly, any financial transaction that involves currency or a monetary instrument;

e) interrompre ou détourner, directement ou indirectement, des opérations financières qui font intervenir des espèces ou des effets;

(f) interfering with the movement of any person, excluding the detention of an individual; and

f) entraver les déplacements de toute personne, à l'exception de la détention d'un individu;

(g) personating a person, other than a police officer, in order to take a measure referred to in any of paragraphs (a) to (f).

g) se faire passer pour une autre personne, à l'exception d'un policier, dans le but de prendre l'une des mesures prévues aux alinéas a) à f).

Matters to be specified in application

Contenu de la demande

(2) An application to a judge under subsection (1) shall be made in writing and be accompanied by the applicant's affidavit deposing to the following matters:

(2) La demande est présentée par écrit et accompagnée de l'affidavit du demandeur portant sur les points suivants :

(a) the facts relied on to justify the belief on reasonable grounds that a warrant under this section is required

a) les faits sur lesquels le demandeur s'appuie pour avoir des motifs raisonnables de croire que le mandat

to enable the Service to take measures to reduce a threat to the security of Canada;

est nécessaire pour permettre au Service de prendre des mesures pour réduire une menace envers la sécurité du Canada;

(b) the measures proposed to be taken;

b) les mesures envisagées;

(c) the reasonableness and proportionality, in the circumstances, of the proposed measures, having regard to the nature of the threat, the nature of the measures, the reasonable availability of other means to reduce the threat and the reasonably foreseeable effects on third parties, including on their right to privacy;

c) le fait que les mesures envisagées sont justes et adaptées aux circonstances, compte tenu de la nature de la menace et des mesures, des solutions de rechange acceptables pour réduire la menace et des conséquences raisonnablement prévisibles sur les tierces parties, notamment sur leur droit à la vie privée;

(d) the identity of the persons, if known, who are directly affected by the proposed measures;

d) l'identité des personnes qui sont touchées directement par les mesures envisagées, si elle est connue;

(e) the persons or classes of persons to whom the warrant is proposed to be directed;

e) les personnes ou catégories de personnes destinataires du mandat demandé;

(f) a general description of the place where the warrant is proposed to be executed, if a general description of that place can be given;

f) si possible, une description générale du lieu où le mandat demandé est à exécuter;

(g) the period, not exceeding 60 days or 120 days, as the case may be, for which the warrant is requested to be in force that is applicable by virtue of subsection (6); and

g) la durée de validité applicable en vertu du paragraphe (6), de soixante jours ou de cent vingt jours au maximum, selon le cas, demandée pour le mandat;

(h) any previous application made under subsection (1) in relation to a person who is identified in the affidavit in accordance with paragraph (d), the date on which each such application was made, the name of the judge to whom it was made and the judge's decision on it.

h) la mention des demandes antérieures présentées au titre du paragraphe (1) touchant des personnes visées à l'alinéa d), la date de chacune de ces demandes, le nom du juge à qui elles ont été présentées et la décision de celui-ci dans chaque cas.

Issuance of warrant

(3) Despite any other law but subject to the *Statistics Act*, if the judge to whom an application under subsection (1) is made is satisfied of the matters referred to in paragraphs (2)(a) and (c) that are set out in the affidavit accompanying the application, the judge may issue a warrant authorizing the persons to whom it is directed to take the measures specified in it and, for that purpose,

(a) to enter any place or open or obtain access to any thing;

(b) to search for, remove or return, or examine, take extracts from or make copies of or record in any other manner the information, record, document or thing;

(c) to install, maintain or remove any thing; or

(d) to do any other thing that is reasonably necessary to take those measures.

Measures taken outside Canada

(4) Without regard to any other law, including that of any foreign state, a judge may, in a warrant issued under subsection (3), authorize the measures specified in it to be taken outside Canada.

Matters to be specified in warrant

Délivrance du mandat

(3) Par dérogation à toute autre règle de droit mais sous réserve de la *Loi sur la statistique*, le juge à qui est présentée la demande visée au paragraphe (1) peut décerner le mandat s'il est convaincu de l'existence des faits qui sont mentionnés aux alinéas (2)a) et c) et énoncés dans l'affidavit qui accompagne la demande; le mandat autorise ses destinataires à prendre les mesures qui y sont indiquées. À cette fin, il peut autoriser aussi, de leur part :

a) l'accès à un lieu ou un objet ou l'ouverture d'un objet;

b) la recherche, l'enlèvement ou la remise en place de tout document ou objet, leur examen, le prélèvement des informations qui s'y trouvent, ainsi que leur enregistrement et l'établissement de copies ou d'extraits par tout procédé;

c) l'installation, l'entretien et l'enlèvement d'objets;

d) les autres actes nécessaires dans les circonstances à la prise des mesures.

Mesures à l'extérieur du Canada

(4) Sans égard à toute autre règle de droit, notamment le droit de tout État étranger, le juge peut autoriser la prise à l'extérieur du Canada des mesures indiquées dans le mandat décerné en vertu du paragraphe (3).

Contenu du mandat

(5) There shall be specified in a warrant issued under subsection (3)

(5) Le mandat décerné en vertu du paragraphe (3) porte les indications suivantes :

(a) the measures authorized to be taken;

a) les mesures autorisées;

(b) the identity of the persons, if known, who are directly affected by the measures;

b) l'identité des personnes qui sont touchées directement par les mesures, si elle est connue;

(c) the persons or classes of persons to whom the warrant is directed;

c) les personnes ou catégories de personnes destinataires du mandat;

(d) a general description of the place where the warrant may be executed, if a general description of that place can be given;

d) si possible, une description générale du lieu où le mandat peut être exécuté;

(e) the period for which the warrant is in force; and

e) la durée de validité du mandat;

(f) any terms and conditions that the judge considers advisable in the public interest.

f) les conditions que le juge estime indiquées dans l'intérêt public.

Maximum duration of warrant

Durée maximale

(6) A warrant shall not be issued under subsection (3) for a period exceeding

(6) Il ne peut être décerné de mandat en vertu du paragraphe (3) que pour une période maximale :

(a) 60 days if the warrant is issued to enable the Service to take measures to reduce a threat to the security of Canada within the meaning of paragraph (d) of the definition threats to the security of Canada in section 2; or

a) de soixante jours, lorsque le mandat est décerné pour permettre au Service de prendre des mesures pour réduire une menace envers la sécurité du Canada au sens de l'alinéa d) de la définition de telles menaces à l'article 2;

(b) 120 days in any other case.

b) de cent vingt jours, dans tout autre cas.

~~TOP SECRET~~

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-243-20
STYLE OF CAUSE:	IN THE MATTER OF AN APPLICATION BY [redacted] FOR WARRANTS PURSUANT TO SECTIONS 16 AND 21 OF THE *CANADIAN SECURITY INTELLIGENCE SERVICE ACT*, R.S.C. 1985, c. C-23 AND IN THE MATTER OF **[a foreign state, group of states or person]**
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CONCURRED IN BY:	DE MONTIGNY J.A. MACTAVISH J.A.
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